(NOT DESIGNATED FOR PUBLICATION)

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NO. 2003 CA 0871

DR. STEVEN RUSHING
VERSUS
THE BOARD OF SUPERVISORS OF THE
UNIVERSITY OF LOUISIANA SYSTEM
(SOUTHEASTERN LOUISIANA UNIVERSITY)

JUDGMENT RENDERED ON MAY 14, 2004

Appealed from the
Nineteenth Judicial District Court
in and for the Parish of East Baton Rouge, State of Louisiana

Trial Court No. 464,510

Honorable William A Morvant, Judge

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Panel composed of Judges FRANK FOIL, BRADY M. FITZSIMMONS and EDWARD J. GAIDRY.

FOIL, JUDGE.

In this appeal, a university professor challenges the action of the trial court in granting summary judgment dismissing his due process, first amendment and retaliation claims against the university. In connection therewith, the professor contests the trial court's refusal to strike a police complaint levied against him by a fellow instructor from consideration as evidence on the motion. We affirm.

BACKGROUND

Dr. Steven Rushing, an associate professor of music employed by the University of Louisiana System at Southeastern University (SLU), filed a series of grievances against various SLU committees, faculty, staff and administrators. The first set of grievances stemmed from an administrative decision denying his request for approval to participate in an opera production. On November 11, 1998, Dr. Rushing filed a formal grievance with Dr. John Crain, President of SLU's Faculty Senate, complaining of numerous alleged flaws in the university's professional funding process. A second grievance notified Dr. David Evenson, the head of the music department, that Dr. Rushing intended to file another official grievance for incidents occurring after November 11, 1998. In a letter dated January 22, 1999, to Dr. Evenson and entitled "Grievance #3," Dr. Rushing charged the Faculty Grievance Committee with violating SLU's rules for failing to timely conduct hearings on the previous grievances. Dr. Rushing forwarded grievances #1, #2 and #3 to Dr. Sally Clausen, SLU's President, charging that SLU officials failed to conduct hearings and comply with procedures outlined in the Faculty

Handbook on his grievances. Dr. Clausen responded that she lacked authority to render a decision on the grievance.

On March 7, 1999, Dr. Rushing filed grievance #4 against Dr. Randy Moffett, SLU's Provost and a member of the Grievance Committee, alleging that he failed to timely conduct hearings and render decisions on the second and third grievances. Dr. Rushing's fifth grievance was filed against numerous SLU officials and the Grievance Committee, alleging that his prior grievances were improperly considered abandoned on erroneous procedural grounds.

On April 11, 1999, Dr. Rushing submitted his sixth grievance to Dr. Evenson, complaining about the removal of one of his students, Melissa LeBlanc. The student had been reassigned by Dr. Evenson to the studio of Scharmal Schrock, another SLU faculty member, after the student's mother complained that Dr. Rushing failed to keep up with her daughter's lessons. It is undisputed that on April 13, 1999, Dr. Rushing confronted Ms. Schrock at her studio and engaged in an angry tirade concerning the Ms. LeBlanc's removal in the presence of Ms. LeBlanc. Ms. Schrock later filled out a Witness/Victim Statement Form with the SLU Police Department regarding the incident. The incident prompted administrative review by SLU under its workplace violence policy.

Dr. Evenson issued a written reprimand to Dr. Rushing for his behavior during the April 13 incident. On April 26, 1999, Dr. Rushing was notified that he was being placed on leave with pay and was relieved of all teaching and other job duties pending an investigation of his job performance and conduct towards students and colleagues. In early June of 1999, Dr. Clausen appointed an ad hoc grievance committee to investigate Dr. Schrock's complaint under the workplace violence policy. Dr. Rushing was given

the opportunity to explain his version of the incident to the committee. On August 16, 1999, Dr. Rushing was restored to all of his teaching duties.

After conducting seven meetings, the ad hoc committee concluded that Dr. Rushing's conduct during the April 13 incident was inappropriate and unprofessional, but did not pose a credible threat. The committee recommended that Dr. Rushing be required to receive mandatory workplace violence training and that he be encouraged to seek anger management counseling.

On September 13, 1999, Dr. Rushing filed this lawsuit against SLU's Board of Supervisors (Board), challenging the April 26, 1999 suspension from his teaching duties with pay, asserting that the Board failed to provide him with his due process right to pre-deprivation notice and an opportunity to respond. He further charged that the suspension was done in retaliation for his filing of the six grievances. Additionally, Dr. Rushing charged that the university system failed to hear his grievances in accordance with its promulgated policy and due process, and claimed that he was entitled to have the grievances heard in accordance with those policies. Dr. Rushing sought to recover damages for mental. and emotional distress, anguish, anxiety, humiliation, embarrassment and damage to his reputation allegedly suffered by him as the result of his April 26 suspension and the denial of his due process rights.

Thereafter, on October 5, 1999, in accordance with the ad hoc committee's recommendation, Dr. Clausen ordered Dr. Rushing to undergo anger management counseling and to furnish her with reports from his counselor verifying that he was undergoing treatment. Approximately two weeks later, Dr. Rushing filed his seventh grievance with Dr. Evenson, complaining of two "new incidents" which caused him to be

aggrieved, presumably relating to the order to undergo anger management counseling and furnish evidence thereof, which he asserted were discriminatory and had been done to harass him.

By letter dated October 29, 1999, Dr. Rushing was notified that the Grievance Committee for the University of Louisiana System considered his appeal and affirmed SLU's action, denying him a hearing.

On November 23, 1999, Dr. Clausen again placed Dr. Rushing on leave with pay for failing to provide her with evidence of anger management treatment, and apprised him that he would remain at that status until the necessary documentation was presented to her. On December 21, 1999, SLU was furnished with a counselor's report indicating that Dr. Rushing had been treated for depression in the past. Dr. Clausen advised Dr. Rushing on January 6, 2000 that he was being placed on leave without pay because the report submitted did not comply with her November 23, 1999 directive, and because there was an ongoing. concern whether Dr. Rushing. posed any risk to the students, staff or faculty of the university. Dr. Rushing was notified that he was entitled to a hearing to contest the action, and a hearing date was set.

On January 23, 2000, grievance #8 was submitted by Dr. Rushing to Bobby Jindal, the President of the University of Louisiana System, complaining of the January 6 suspension and seeking reinstatement. The grievance was returned with the notation, "refused."

On January 31, 2000, a "Loudermill Hearing"[18] was held before a special committee convened for the purpose of

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[18] See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985).

providing Dr. Rushing an opportunity to present his side of the story as it related to Dr. Clausen's action taken on January 6. Dr. Rushing was present and represented by counsel. The committee recommended that Dr. Clausen obtain additional documentation to show that Dr. Rushing received a full psychiatric evaluation as requested, as well as the psychiatrist's opinions regarding Dr. Rushing's ability to work without restriction and whether he posed a risk to others. The Committee further recommended that Dr. Rushing be continued on leave with pay for at least thirty days, pending the production of the documentation.

On February 23, 2000, Dr. Clausen advised Dr. Rushing that his status was changed to leave with pay pending her receipt of the documentation recommended by the committee. Documentation was provided within the deadline, and Dr. Rushing's status was extended to receive additional clarifying documentation. On June 30, 2000, Dr. Clausen advised Dr. Rushing that his status of leave with pay was lifted as of that date, and that he could return to his regular duties.

In March of 2002, Dr. Rushing filed a charge of discrimination with the United States Equal Employment Opportunity Commission (EEOC), claiming that SLU discriminated against him by reason of his "disability" in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (ADA). Several months later, he submitted his ninth grievance to Dr. Evenson, based upon the suspension of hearings on all prior grievances. The subject matter was specified to relate to salary and/or working conditions, lack of policies or misapplication or violations of SLU's rules.

On June 25, 2002, Dr. Rushing filed a supplemental and amended petition asserting claims of discrimination and retaliation in violation of the ADA and Title VII of the Civil

Rights Act of 1964, 42 U.S.C. § 2000e, et seq., based on the filing of Grievance No. 7 and other "protected activity." He alleged SLU and the Board retaliated against him by suspending his rights to the grievance procedure, suspending him with and without pay, demanding that he seek documented anger management therapy and the refusal to conduct hearings on grievances number 8 and 9.

The Board filed a motion for summary judgment, and evidence was submitted in support of and in opposition to the motion. Dr. Rushing filed a motion to strike the police complaint form attached to the Board's supporting memorandum as an exhibit on the basis that it was not sworn or verified.

Both motions were heard on February 18, 2003. Thereafter, the trial court ruled in favor of the Board on both motions. This appeal, taken by Dr. Rushing, followed.

MOTION TO STRIKE

We first briefly address. Dr. Rushing's first assignment of error, in which he complains that the trial court erred in denying his motion to strike the police complaint form. Dr. Rushing asserted that the Witness/Victim Statement Form should not have been considered by the trial court in rendering the decision on the motion for summary judgment because it was unsworn and unverified. We find, however, that even if the trial judge erred in refusing to strike this piece of evidence, any such error would be harmless beyond a doubt. It is undisputed that Dr. Rushing's conduct in verbally confronting his fellow professor in front of a student in an angry manner prompted the April 26th suspension from his teaching duties with pay pending an investigation. The Witness/Victim Statement Form sets forth the specifics of the encounter. What was relevant for the purpose of the motion

for summary judgment was the fact that the encounter took place, not the specifics of that encounter. Accordingly, we find no reversible error in the trial court's refusal to strike the form from evidence.

SUMMARY JUDGMENT

This court reviews summary judgments *de novo* based upon the same criteria used by, the trial court in deciding whether summary judgment is appropriate. **Simmons v. Berry,** 98-0660, p. 4 (La. App. 1 Cir. 12/22/00), 779 So.2d 910, 913-914. Summary judgment is proper if the pleadings, depositions, answers to interrogatories, admissions and affidavits on file show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C. P. art. 966B.

In assignment of error number two, Dr. Rushing contends that the trial court erred in granting the motion for summary judgment, asserting that he met his burden of showing that there are genuine issues of material fact as to whether the Board denied his due process rights by refusing to hear his grievances and by suspending him, and that the Board, by suspending him with and without pay, retaliated and discriminated against him for filing the grievances, this lawsuit and the EEOC charge.

1. DUE PROCESS CLAIMS

Dr. Rushing claims that his suspension without a prior hearing violated his right to due process. In **Cleveland Board of Education v. Loudermill,** 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), the United States Supreme Court concluded that procedural due process guarantees generally entitle a public employee dismissible only for cause, such as a tenured employee, to a least a limited hearing

prior to his termination in order to tell his side of the story. To claim the protections of the due process clause under the Fourteenth Amendment to the United States Constitution or Article I Section 2 of the Louisiana Constitution, a claimant must show the existence of some property or liberty interest that has been adversely affected by state action. **Johnson v. Southern University,** 00-2615, p.6 (La. App. 1 Cir. 12/28/01), 803 So.2d 1140, 1144-45.

Here, Dr. Rushing was not terminated, nor did he suffer the loss of any compensation—it is undisputed that Dr. Rushing's pay was never interrupted. Courts have long held that any constitutionally protected employment interest a tenured employee has as a result of his employment contract is satisfied by payment of the full compensation due under the contract. **Huang v. Board of Governors of University of North Carolina,** 902 F.2d 1134, 1141 (4th Cir. 1990). It is clear that Dr. Rushing has not been deprived of a property interest by the university, and therefore, the trial court correctly dismissed the due process claims based on the suspensions. We next address Dr. Rushing's claims that his due process rights were violated by SLU's failure to hold hearings on his grievances in accordance with the terms of the university's Faculty Handbook. The due process clause does not vest a tenured faculty member with a property interest in every facet of his employment. See **Johnson v. Southern University & A & M College,** 00-2615, at p. 7, 803 So.2d at 1145. We find that an internal grievance procedure, contained in a faculty handbook, does not, as a matter of law, constitute a constitutionally protected property right. Therefore, we conclude the trial court properly dismissed Dr. Rushing's due process claims based on the alleged failure of the university to follow its internal grievance procedures.

2. FIRST AMENDMENT CLAIMS

Dr. Rushing contends that by refusing to hear his grievances, the Board violated his First Amendment right to free speech. He also insists that the university retaliated against him for filing the grievances in violation of the First Amendment. Generally, in order to prevail on either claim, a public employee must demonstrate that the speech involved a matter of public concern. See **Connick v. Myers,** 461 U.S. 138,, 147, 103 S.Ct 1684, 1690, 75 L.Ed. 708 (1983). The substance of grievances 1-5 relate to the university's decision not to fund Dr. Rushing's request to participate in an opera, an internal fiscal administrative decision, on a matter personal to Dr. Rushing. The remaining grievances derive from the re-assignment of one of Dr. Rushing's students, clearly a personal matter. Thus, we conclude that as none of the grievances constitute speech on a matter of public concern, Dr. Rushing cannot prevail on these claims as a matter of law, and summary judgment was properly entered.

3. RETALIATION CLAIMS UNDER THE ADA AND TITLE VII

Dr. Rushing submits that there exists a genuine issue of material fact as to whether the Board discriminated against him for filing a charge of discrimination with the EEOC. In order to establish *a prima facie* case of unlawful retaliation under Title VII or the ADA, a plaintiff must establish that (1) he engaged in a protected activity protected under Title VII or the ADA; (2) an adverse employment action occurred and (3) there is a causal connection between the protected action and the adverse action. **Seaman v. CSPH, Inc.,** 179 F.3d 297, 301 (5th Cir. 1999); **Long v. Eastfield College,** 88 F.3d 300, 304 (5th Cir. 1996). Once a plaintiff has established a *prima facie* case, the defendant must come forward with a

legitimate, nondiscriminatory reason for the adverse employment action. If the reason is advanced, the plaintiff must adduce sufficient evidence that the proffered reason is a pretext for retaliation. Ultimately, the employee must show that "but for" the protected activity, the adverse employment action would not have occurred. **Seaman v. CSPH,** 179 F.3d at 301.

Rushing claims that he participated in a protected activity when he filed Grievance #7 with SLU and a complaint of discrimination with the EEOC. He insists that his suspension was in retaliation for his filing of this grievance and that he can demonstrate the reasons advanced by SLU are a mere pretext for that retaliation. We disagree.

In this case, SLU established that it had a legitimate, non-retaliatory reason for suspending Dr. Rushing from his teaching duties, namely, concern for the safety of faculty, staff and students following Dr. Rushing's confrontational verbal altercation with a fellow music professor in front of a student. This incident triggered administrative review by the university pursuant to its workplace violence policy. The first suspension was ordered for investigative purposes; the remainder of the time that Dr. Rushing was on suspended status was due largely in part to his own failure to provide the university with documentation evidencing he had undergone anger management counseling and a full mental evaluation. In short, Dr. Rushing produced no evidence to show that absent the filing of his internal grievance, EEOC complaint and this lawsuit, the alleged retaliatory actions of SLU would not have occurred. Therefore, the decision of the trial court to dismiss these claims was correct.

CONCLUSION

For the foregoing reasons, we hold that the trial court correctly granted summary judgment in favor of the Board, dismissing all of Dr. Rushing's claims. All costs of this appeal are assessed to appellant.

AFFIRMED.

GAIDRY, J., dissenting in part and assigning additional reasons.

For the following reasons, I would reverse the judgment denying the motion to strike and reverse the summary judgment in part and affirm it in part. I therefore dissent in part, but join the majority in all other respects.

The incident of April 13, 1999 is of particular importance. Dr. Schrock's police report and complaint was what triggered administrative review under SLU's workplace violence policy. The *ad hoc* grievance committee appointed by Dr. Clausen concluded in its report of September 2, 1999 to Dr. Clausen that Dr. Rushing's conduct during the incident was "inappropriate and unprofessional," but that he did not pose a "credible threat" in terms of causing *actual* fear of physical harm.

Also of importance is that on September 15, 2001, Dr. Moffett sent Dr. Rushing a letter of agreement confirming his tenured faculty appointment for the 2001-2002 academic year, stating, "The terms of your employment are stated in the Southeastern Louisiana University Faculty Handbook...."[1]

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[1] A similar letter was sent to Dr. Rushing on October 2, 2002, for the 2002-2003 academic year.

The only evidence in the record relating to the prior terms of his employment consists of the advertisement for his initial non-tenured position, and the letters of offer and acceptance of that position, none of which even mention either the handbook or the grievance procedure.

Despite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. *Willis v. Medders*, 00-2507, p. 2 (La. 12/8/00), 775 So.2d 1049, 1050. And even after the significant changes in favor of summary judgment, the jurisprudence continues to uniformly hold that the granting of summary judgment is rarely appropriate for cases involving the judicial determination of subjective facts such as motive, intent, good faith, or knowledge. *See Vanderbrook v. Coachmen Industries, Inc.*, 01-0809, pp. 6-7 (La. App. 1st Cir. 5/10/02), 818 So.2d 906, 910-11.

THE MOTION TO STRIKE

Louisiana Code of Civil Procedure article 964 authorizes the use of a motion to strike, providing as follows:

> The court on motion of a party or on its own motion may at any time and after a hearing order stricken from any pleading any insufficient demand or defense or any redundant, immaterial, impertinent, or scandalous matter.

It might legitimately be questioned whether Dr. Rushing's motion to strike was a proper vehicle to challenge the admissibility of the police complaint form at issue. The complaint form itself does not constitute a defense but rather

an item of evidence, and cannot properly be categorized as a redundant, immaterial, impertinent, or scandalous allegation. But I need not further discuss that procedural point, as the motion should appropriately be treated as a written evidentiary objection to the complaint form.

Louisiana Code of Civil Procedure article 967(A) provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The article further expressly requires that "*[s]worn or certified copies of all papers or parts thereof referred to in an affidavit* shall be attached thereto or served therewith." (Our emphasis.) A party may not utilize unsworn and unverified documents as summary judgment evidence. *Sanders v. J. Ray McDermott, Inc.*, 03-0064 p. 4 (La. App. 1st Cir. 11/7/03), So.2d , . A document which is not an affidavit or sworn to in any way, or which is not certified or attached to an affidavit, is not of sufficient evidentiary quality to be given weight in determining whether there are remaining genuine issues of material fact. *Id.; Robertson v. Northshore Regional Medical Center,* 97-2068, pp. 5-6 (La. App. 1st Cir. 9/25/98), 723 So.2d 460, 464. Likewise, an unsworn, uncertified document simply attached to a memorandum may not properly be considered by the court in determining a motion for summary judgment. *State v. Exxon Corporation,* 95-2501, p. (La. App. 1st Cir. 6/28/96), 676 So.2d 783, 787.

The Board interprets Dr. Rushing's objection to the complaint form as grounded in its hearsay nature, and attempts to characterize the item as relevant non-hearsay evidence by reason of its being offered not to prove the truth of its contents, but simply to demonstrate that the actions taken by SLU and the Board against Dr. Rushing were

justified based upon a reasonable perception of the matters asserted therein. I agree that the document may ultimately be relevant on that issue. But this begs the question of whether it was properly considered by the trial court for summary judgment.

I conclude that Dr. Rushing's contentions relating to the consideration of the complaint form, in the context of summary judgment, have merit.[2] As is clear from the trial court's reasons for judgment and the content of the complaint form itself, its consideration was important in the determination of whether genuine issue of material fact existed on the subjective issue of motivation for the suspensions. I dissent from the majority's ruling on the motion to strike, as the trial court's error was not harmless.

THE MOTION FOR SUMMARY JUDGMENT

DUE PROCESS CLAIMS BASED UPON THE GRIEVANCES

Dr. Rushing contends that he had a contractual right to the grievance procedure set forth in SLU's faculty handbook at the time he filed his grievances, and that this contractual right constitutes a property right of which he may not be deprived without due process. I agree with the majority that even if he had a contractual right to utilize the grievance procedure, such a right is simply not a property right under our law.

In point, our jurisprudence has consistently recognized that a grievance procedure set forth in a faculty handbook is a unilateral expression of employer policy, and

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[2] It is not necessary at this point to address the issues of the complaint form's relevancy and hearsay status in a context outside of summary judgment, such as in trial on the merits.

its mere publication does not evidence a meeting of the minds. *Mix v. University of New Orleans*, 609 So.2d 958, 961 (La. App. 4th Cir. 1993), *writ denied,* 612 So.2d 83 (La. 1993). *See also Schwarz v. The Administrators of the Tulane Educational Fund,* 97-0222, p. (La. App. 4th Cir. 9/10/97), 699 So.2d 895, 897-98; *Stanton v. Tulane University of Louisiana,* 00-0403, pp. 14-15 (La. App. 4th Cir. 1/10/01), 777 So.2d 1242, 1250-51, *writ denied*, (La. 4/12/01).

State law defines what constitutes a property interest subject to procedural due process protection. *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). While compensation, overtime pay, and vested retirement benefits certainly constitute property rights, it is clear that any assumed obligation of an employer to provide an internal grievance procedure simply does not vest its employee with a property right under our law. Thus, SLU's alleged failure to strictly follow the grievance procedure outlined in the faculty handbook, and the Board's refusal to overrule its action in that regard, even after September 15, 2001, simply do not rise to the level of denial of procedural due process.[3]

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[3] *See Levine v. Torvik, 986* F.2d 1506, 1515 (6th Cir. 1993), *cert. denied, 509 U.S. 907,* 113 S.Ct. 3001, 125 L.Ed2d 694 (1993) ("A state cannot be said to have a federal due process obligation to follow all of its procedures; such a system would result in the constitutionalizing of every state rule, and would not be administrable.") Whether the manner in which the grievances were handled amounts to denial of "academic due process" (a term used by Dr. Rushing in some of the correspondence in evidence), in terms of a breach of contractual rights to specific procedures, as opposed to constitutional due process, is a wholly different issue. *See generally Ailsa W.* Chang, Note, *Resuscitating the Constitutional "Theory of Academic Freedom: A Search for a Standard Beyond Pickering and Connick*, 53 Stan. L. Rev. 915 (2001).

I also agree with the majority that Dr. Rushing had no liberty interest protected by due process under either the federal constitution or our state constitution regarding his various grievances. Dr. Rushing contends that a genuine issue of material fact exists as to whether his grievances related to matters of public concern. I must disagree that a factual issue is presented. Whether an expression involves a matter of public concern is a question of law, not fact. *Connick v. Myers,* 461 U.S. 138, 148 n.7, 103 S.Ct. 1684, 1690 n.7, 75 L.Ed.2d 708. Speech that does not relate to "any matter of political, social or other concern to the community" is not of public concern. *Connick,* 461 U.S. at 146, 103 S.Ct. at 1690. I join with the majority in concluding that none of the grievances relate to "matters of public concern," as a matter of law.

DUE PROCESS CLAIMS BASED UPON THE SUSPENSIONS

The United States Supreme Court has recognized that *de minimis* property interests do not trigger procedural due process protections. *See Goss v. Lopez,* 419 U.S. 565, 576, 95 S.Ct. 729, 737, 42 L.Ed.2d 725 (1975). Here, the nominal suspensions without pay were of relatively short duration and were *de facto* suspensions with pay, and no deprivation of due process occurred.

FIRST AMENDMENT RETALIATION CLAIM

The factual allegations of Dr. Rushing's petition are broad enough to encompass a claim for retaliation under 42 U.S.C. § 1983 for the exercise of his right to freedom of speech under the First Amendment to the United States Constitution and the corresponding language of Article I, § 7 of the Louisiana Constitution. As previously stated, none of

Dr. Rushing's grievances, including his "grievances against the grievance procedure," constitute speech on a matter of public concern, but rather each was "an employee grievance concerning internal office policy" or a grievance on matters of private concern. *Connick*, 461 U.S. at 154, 103 S.Ct. at 1693-94.[4] Thus, even if his suspensions amounted to adverse employment actions, his First Amendment retaliation claims based upon the filing of all his grievances have no merit.

THE ADA AND TITLE VII CLAIMS

In his EEOC charge, attached to and incorporated in his supplemental and amended petition, Dr. Rushing identified the discrimination forming the basis of his ADA and Title VII claims as commencing on November 29, 2001, and continuing thereafter. The stated cause of the discrimination was not specified as race, color, sex, religion, national origin, retaliation, age, or disability, but as "other." However, in describing the particulars of the charge, Dr. Rushing claimed that SLU violated the ADA "based on my disability by subjecting me to different terms and conditions of employment."

In support of its motion for summary judgment, the Board submitted the affidavit of Gene Pregeant, SLU's ADA/EEO compliance officer, documenting that as of September 4, 2002, SLU had never received a grievance, complaint or other notice from Dr. Rushing of any limitations caused by depression or any other claimed disability nor any request for related accommodations as required by the ADA. The affidavit of Mr. Pregeant, Dr. Rushing's own deposition

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[4] In *Mix*, 609 So.2d at 960, the court held that a university grievance procedure related only to "the regulation of ***internal management***," and therefore did not constitute a "rule" subject to the formalities of the Louisiana Administrative Procedures Act, La. R.S. 49:950, *et seq.* (Our emphasis.)

testimony, and the substance of his treating psychiatrist's reports demonstrate the absence of the element of notice of disability and consequent limitation required by the ADA. *See Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 164 (5th Cir. 1996). His ADA discrimination claim was therefore properly dismissed by the trial court. For the similar failure to establish *a prima facie* case as to the required element of his membership in a protected class, his Title VII discrimination claim based on his claimed "disability" also was properly dismissed.

However, based upon my review of the evidence in the record, I agree with Dr. Rushing that there is genuine issue of material fact as to his ADA and Title VII retaliation claims for any claimed incident of adverse employment action constituting retaliation in response to protected activity occurring after November 29, 2001, including the protected activity of the filing of the EEOC charge of March 14, 2002. *See Fabela v. Socorro Independent School District, 329* F.3d 409 (5th Cir. 2003). The summary judgment should therefore be reversed insofar as it dismissed those claims, but affirmed as to any such claims for alleged incidents of retaliation prior to November 29, 2001. Accordingly, I dissent in part from the majority's decision on the foregoing limited grounds.

BREACH OF CONTRACT

I further conclude that the allegations of Dr. Rushing's petition, as amended, are broad enough to state a cause of action for breach of contract against the Board, even though his petition does not expressly couch a claim in such terms. In that regard, I note that he has alleged that he is employed "with full tenure," that the actions of SLU and the Board relating to his various grievances have denied him "due process *guaranteed by the System Rules"* (academic or disciplinary due process), violated his "contractual rights to

the university's grievance process," which entitle him "to have his grievances heard in accordance with the promulgated policy," and that his suspensions were "illegal." The prayer of his original petition requests that the court order specific performance of the grievance procedure by the Board. And his affidavit further clarifies the allegations of his petition by specifically claiming that SLU's "breach of contract" caused him financial losses. Conclusory though this statement may be, when read in light of his petition's allegations and the evidence in the record, it is apparent that there are genuine issues of material fact as to whether the alleged failures of SLU and the Board to comply with SLU's grievance procedure after September 15, 2001 constituted breaches of the terms of Dr. Rushing's employment contract, apart from the alleged deprivation of constitutional due process.

Here, Dr. Rushing has demonstrated that the terms of his employment after September 15, 2001 are stated in the faculty handbook. The grievance procedure, if forming part of those terms, could very well constitute a contractual employment benefit (although not in the sense of a property right or perquisite). In so concluding, however, I must disagree with Dr. Rushing's argument that the principles articulated in *Knecht v. Board of Trustees for State Colleges and Universities*, 591 So.2d 690 (La. 1991), operate to vest any type of employment benefit set out in an employment handbook with the attributes of an enforceable obligation. The "contractual right" recognized in *Knecht* was expressly found to be a "property interest." *Id.* at 696.

There is genuine issue of material fact as to whether the terms of Dr. Rushing's tenured contract after September 15, 2001 included all of the provisions of the faculty handbook, including a contractual right to invoke a mandatory grievance procedure, and, if so, whether SLU and the Board have failed to fulfill their obligations in that regard.

As to the issue of whether his tenured employment contract *prior* to September 15, 2001, included a similar contractual right, I conclude that Dr. Rushing has failed to produce factual support sufficient to satisfy his evidentiary burden on that issue at trial. Accordingly, any claims relating to the handling of grievances filed prior to September 15, 2001 were properly dismissed, and to that extent I again join in the majority' decision. Under my analysis, this would leave only those claims relating to Grievance No. 9 for determination by the trial court.

The historic purpose of tenure, which originated in higher education, was the protection of academic freedom by preventing arbitrary or repressive dismissal. *Thorne v. Monroe City School Board, 542* So.2d 490, 491 (La. 1989). There is genuine issue of material fact as to whether the suspensions and related actions of SLU and the Board were arbitrary and constituted a breach of Dr. Rushing's contract as a tenured associate professor.[5] Summary judgment based upon the determination of such. disputed subjective facts was not appropriate, especially given the improper consideration of the police complaint form.[6]

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[5] Dr. Rushing's affidavit and its exhibits sufficiently raise genuine issue of material fact relating to the motivation behind his suspensions following the issuance of the *ad hoc* committee report which concluded that he did not pose a "credible threat" by reason of the incident with Dr. Schrock. In particular, Dr. Rushing's sworn statement that during a meeting with Dr. Moffett on April 23, 1,999, to discuss Grievances Nos. 4 and 5, Dr. Moffett "tried to convince [him] to agree to suspend" all of his grievances filed as of that date (Grievances Nos. I through 5), advised Dr. Rushing that he was being placed on paid leave, and then reversed himself on the leave issue raises genuine issue as to the motive and justification for the subsequent suspensions.

[6] *See* La. C.C.P. art. 966(E).

The trial court erred in dismissing this action in its entirety by summary judgment. I would remand the following described claims as to which summary judgment was inappropriate: (1) those claims for breach of contract relating to the suspensions, (2) those claims for breach of contract relating to any grievances arising after September 15, 2001 (Grievance No. 9), and (3) any claims for retaliation under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.*, and Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e, *et seq.*, arising after November 29, 2001.

In conclusion, however quixotic or unlikely of success the above listed claims may appear to be, summary judgment dismissing them was inappropriate, given the content of the record. I join, however, in the majority's assessment of all costs of this appeal to the plaintiff-appellant, Stephen Rushing, Ph.D.

19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

DR. STEVEN RUSHING

VERSUS NO. 464510 DIV. H

THE BOARD OF SUPERVISORS OF
THE UNIVERSITY OF LOUISIANA SYSTEM
(SOUTHEASTERN LOUISIANA UNIVERSITY)

JUDGMENT

This matter came before the Court on February 18, 2003, on Motion for Summary Judgment by defendant and Motion to Strike by plaintiff. Present in open court were Winston Decuir, Russell W. Rudolph, and Michael D. Bass, attorneys for defendant; and J. Arthur Smith and Greg Toney, attorneys for plaintiff. After arguments of counsel were heard, the Court concluded that the law and evidence were in favor of the defendant, for the reasons orally assigned by the Court.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the plaintiff's Motion to Strike is denied and the defendant's Motion for Summary Judgment is granted, dismissing all of the plaintiff's claims with prejudice at plaintiff's cost.

Baton Rouge, Louisiana, this 17th day of March, 2003.

/s/ Honorable William Morvant.

19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
CIVIL SECTION XIII

DR. STEVEN RUSHING

V. NO. 464,510

THE BOARD OF SUPERVISORS OF
THE UNIVERSITY OF LOUISIANA SYSTEM
(SOUTHEASTERN LOUISIANA UNIVERSITY)

EXCERPTS OF TRANSCRIPT

MOTION TO STRIKE DEFENDANT'S EXHIBIT NO. 7
MOTION FOR SUMMARY JUDGMENT

TUESDAY, FEBRUARY 18, 2003
THE HONORABLE WILLIAM A. MORVANT, JUDGE
PRESIDING

APPEARANCES:	FOR:
MR. J. ARTHUR SMITH, III	PLAINTIFF
MR. GREGORY A. TONEY	PLAINTIFF
MR. WINSTON G. DECUIR	DEFENDANT
MR. RUSSELL W. RUDOLPH	DEFENDANT
MR. MICHAEL D., BASS	DEFENDANT

REPORTED AND TRANSCRIBED BY:
BARBARA L. KEARNY, CCR NO. 87141

TUESDAY, FEBRUARY 18, 2003

* * * * * *

The Court: And I realize that summary judgment is not something that's going to be used as an alternative for trial or a substitution for trial, but as we stand right now we almost have from SLU's standpoint basically an admission, okay, these are the facts. we're not disputing that this is what happened, this is the chronology. and as I read your brief, when I was finished, I took the exhibits that were submitted on behalf of Dr. Rushing, I took the exhibits that were submitted on behalf of Southeastern, made up my own copy of all of them and sat and went through each document and compiled in a chronological order so I could get 'a better feel.

* * * * * *

I first looked at the original petition which was the grievances, and in reading the grievances and the due process argument that Dr. Rushing made in that regard, grievances 1 through 5 mostly pertain to the same subject matter. that was –the initial grievance was the funding and the grant procedure done by SLU basically to the exclusion of the Music Department and the Voice Department, and Dr. Rushing felt that they were not being given adequate funding and he had a grievance that he was submitting to the department head pursuant to the procedure outlined in the handbook.

* * * * * *

...The court is going to grant the Motion for Summary Judgment. The Court will sign judgment to that effect upon presentation.

END OF TRANSCRIPT

THE SUPREME COURT
OF THE STATE OF LOUISIANA

DR. STEVEN RUSHING vs. NO. 2004-C-1956

THE BOARD OF SUPERVISORS
OF THE UNIVERSITY OF LOUISIANA
SYSTEM (SOUTHEASTERN LOUISIANA
UNIVERSITY)

IN RE: Rushing, Steven Dr.; - Plaintiff; Applying for Writ of Certiorari and/or Review, Parish of E. Baton Rouge, 19th Judicial District Court Div. H, No. 464510; to the Court of Appeal, First Circuit, No. 2003 CA 0871.

November 8, 2004.

Denied.

Americans With Disabilities Act

42 U.S.C. § 12203(a)

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

Civil Rights

42 U.S.C. § 1981

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title VII

42 U.S.C. § 2000e-3(a)

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.